

## BULLETIN 97-1

April 3, 1997

The attached memorandum offers a summary of municipal issues regarding the FCC's rules on Open Video Systems or "OVS". As many of you know, Boston Edison and Residential Communications Network have formed a venture to offer OVS services to subscribers in 48 Boston-area communities. The FCC's OVS rules will provide the legal framework for any negotiations between municipal officials in these communities and the new joint venture.

The following points are discussed in greater detail in the memo:

- OVS operators may offer video services which are comparable to cable services. Nevertheless, OVS operators are not required to enter into franchise agreements with local communities.
- Municipalities may negotiate the extent of the OVS provider's PEG access obligations. However, the OVS provider does have a default option to connect to the cable operator's PEG access channel feed. In either case, the OVS PEG obligations must be generally comparable to those imposed on the local cable franchisee.
- Local officials are authorized to regulate the OVS provider's use of public rights-of-way, provided they do so in a non-discriminatory and competitively neutral manner.
- Municipalities may charge OVS providers an annual gross revenue fee as compensation for the provider's use of the local rights-of-way. This fee is negotiable, but must be set at the same rate as the incumbent's franchise fee if the parties cannot agree.
- OVS providers are subject to the same must-carry and retransmission requirements as are cable operators.
- Unlike cable operators, OVS providers must open their systems to independent programmers on a non-discriminatory basis. If the demand for programming access exceeds available channel capacity, the OVS operator must limit its own programming and that of its affiliates to no more than one-third of the system's capacity.
- OVS operators are not subject to rate regulation.
- Municipalities may file complaints with the FCC if they have disputes with OVS operators.

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John D. Patrone  
*Commissioner*

This responds to questions raised by a number of municipalities regarding the FCC's new regulations on Open Video Systems ("OVS"), which were issued last year. As you know, a new joint venture between Residential Communications Network and a subsidiary of Boston Edison Company, Boston Energy Technology Group ("RCN/BETG"), recently received FCC approval to operate OVS in a total of 48 Boston area communities. Under the FCC's OVS rules, local communities are authorized to negotiate important local service terms with the OVS operator.

Below is a summary of the OVS rules.

**1. What are open video systems?**

Open video systems or OVS were authorized by Congress under the Telecommunications Act of 1996. OVS operators are in many respects very similar to traditional cable operators: they are wired systems which cross public ways for the purpose of delivering multi-channel video programming to subscribers within a chosen service area. However, OVS operators differ from cable operators in two important respects: *First*, federal law does *not* require that OVS operators obtain a cable franchise. As a result, OVS operators technically do not need the permission of local officials to operate in their communities. Under federal law, however, many critical issues must still be negotiated locally, including fees, provisions for public access television and carriage of local stations.

*Second*, unlike cable systems, the "open" aspect of OVS relates to the fact that the operator must make at least some channel capacity available to independent programmers who are interested in offering programming to the system's subscribers. We anticipate that RCN/BETG will be providing programming similar to that offered by traditional cable operators. Additionally, under FCC rules, RCN/BETG has now begun a mandatory 90-day open enrollment period during which unaffiliated programmers may begin negotiations to participate on RCN/BETG's system. This initial open enrollment period extends through May 28, 1997.

**2. Is RCN/BETG now authorized to offer services to subscribers in the Boston area communities?**

On February 27, 1997 the FCC granted approval for RCN/BETG to begin formulating plans to offer OVS service to 48 greater Boston communities, including the City of Boston. The FCC found that

RCN-BETG "provided the requisite facts and representations concerning the open video systems it intends to operate" and has "certified that it agrees to comply" with the FCC's OVS rules.<sup>1</sup>

It is important to note three things about the current regulatory status of RCN/BETG's OVS. *First*, while RCN/BETG has received this initial certification, it may not offer OVS services until the end of the programming enrollment period on May 28. *Second*, the FCC believes that OVS certification is merely the beginning of the examination of the qualifications and responsibilities of OVS operators, akin to a business filing for a corporate charter. *Third*, local governments will have the opportunity in the coming weeks to question RCN-BETG regarding the services they intend to offer and to negotiate several aspects of this service, including many issues over which local franchising authorities have traditionally exercised control.

### **3. PEG Access Issues**

#### **(a) What are the public access programming obligations of an OVS operator?**

OVS operators should negotiate the extent of their public, educational or governmental ("PEG") access obligations with the local franchising authority ("LFA") and, if the parties so desire, the local cable operator. PEG obligations must be "to the extent possible no greater or lesser than those imposed on the cable operator."<sup>2</sup>

#### **(b) What happens if the LFA and the OVS operator are unable to agree on PEG obligations?**

If the parties are unable to agree, the cable franchisee must allow the OVS operator to connect with the franchisee's PEG access channel feed.<sup>3</sup> The OVS operator is responsible for the costs associated with this connection, but such costs count toward the OVS operator's matching PEG access contributions discussed below.<sup>4</sup> If the parties cannot agree on the terms of this connection, the LFA may decide. In doing so, it may require that the connection take place on government property or on public rights-of-way.<sup>5</sup>

#### **(c) Does the "no greater or lesser" standard apply if the LFA and the OVS operator cannot agree on PEG obligations?**

Yes. In the absence of a PEG agreement, "no greater or lesser" means that the OVS operator must match the PEG access channel capacity provided by the cable operator and must offer this programming to all of its subscribers in the franchise area.<sup>6</sup> However, an OVS operator is not

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<sup>1</sup> In the Matter of: RCN-BETG, LLC Certification to Operate an Open Video System, FCC Memorandum Opinion and Order, ¶ 10 (released February 27, 1997).

<sup>2</sup> 47 U.S.C. § 573(c)(2); FCC Third Report and Order and Second Order on Reconsideration ("Second Order on Reconsideration"), CS Docket No. 96-46, ¶ 129 (released August 8, 1996).

<sup>3</sup> Second Order on Reconsideration, ¶ 132; FCC Second Report and Order ("Order"), CS Docket No. 96-46, ¶ 145 (released June 3, 1996).

<sup>4</sup> Second Order on Reconsideration at ¶ 132.

<sup>5</sup> Order at ¶ 145.

<sup>6</sup> *Id.*, at ¶ 153.

required to carry its PEG programming on the same channel locations chosen by the cable franchisee.<sup>7</sup>

**(d) What about the treatment of franchisee contributions toward PEG access services, facilities and equipment?**

The OVS operator must "match" financial contributions made by the local cable operator that are actually used for PEG access services, facilities and equipment.<sup>8</sup> For example, if the cable franchisee makes an annual contribution of \$20,000 that is used to purchase PEG access equipment, the OVS operator will also be required to contribute \$20,000 annually.<sup>9</sup> Likewise, the OVS operator's PEG obligations should be adjusted if the cable operator's obligations change with franchise renewal.<sup>10</sup>

**(e) How are the costs of in-kind benefits such as cameras or production studios treated when an OVS operator connects with the cable operator's PEG access channel feed?**

OVS operators may work out the amount of such costs with the cable franchisees over in-kind equipment, studios and the like so that PEG service to the community is improved or increased, rather than merely being duplicated.<sup>11</sup> Alternatively, the OVS operator may pay the LFA "the monetary equivalent of the depreciated in-kind contribution, or in the case of facilities, the annual amortization value."<sup>12</sup>

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<sup>7</sup> Second Order on Reconsideration at ¶ 135; Order at ¶ 141, n.329.

<sup>8</sup> Second Order on Reconsideration at ¶ 130.

<sup>9</sup> See generally Second Order on Reconsideration, ¶¶ 129, 130.

<sup>10</sup> Order at ¶ 150.

<sup>11</sup> Second Order on Reconsideration, ¶ 131.

<sup>12</sup> *Id.*

#### **4. Management of Public Rights-of-Way**

##### **(a) With respect to OVS operators, do LFAs retain their traditional authority to manage their public rights-of-way?**

Yes. OVS operators are subject to the authority of a local government to manage its public rights-of-way in a "nondiscriminatory and competitively neutral manner."<sup>13</sup> LFAs may impose such requirements on an OVS operator so long as they are applied equally to all users of the rights-of-way.<sup>14</sup> Conversely, local authorities may not impose specific conditions on use of the rights-of-way that are unrelated to their management function or that apply to an OVS operator differently than to other users.<sup>15</sup> Nevertheless, according to the FCC, "non-discriminatory and competitively neutral" treatment does not necessarily mean "equal" treatment. For example, it could be a non-discriminatory and competitively neutral regulation for a local authority to impose higher insurance requirements based on the number of street cuts an operator planned to make, even though such a regulation would not treat all operators "equally."<sup>16</sup>

##### **(b) What are some examples of legitimate local requirements which may be imposed on OVS operators?**

Some examples of legitimate conditions imposed by local authorities would include (1) the coordination of construction schedules, (2) establishment of standards and procedures for constructing lines across private property, (3) determination of insurance and indemnity requirements, and (4) establishment of rules for local building codes.<sup>17</sup>

According to the FCC, non-discriminatory and competitively neutral management of the public rights-of-way would also include such efforts as (1) scheduling common trenching and street cuts, (2) repairing and resurfacing construction damaged streets, (3) ensuring public safety in the use of public ways by public utilities, cable operators, OVS operators and other similar users, and (4) keeping track of the various systems using the rights-of-way to prevent interference among facilities.<sup>18</sup>

##### **(c) May LFAs hold an OVS operator to additional obligations currently imposed on the incumbent cable operator in its franchise agreement as part of a "competitively neutral" effort to maintain a level playing field between the two operators?**

No. Unless Congress or the FCC have specifically granted such rights to state and local governments -- as in the case of PEG access -- or unless they specifically relate to local management of the public rights-of-way, any local requirements that seek to impose "franchise-like requirements" on an OVS operator are prohibited. Examples cited by the FCC include requirements for

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<sup>13</sup> Order at ¶¶ 208, 209.

<sup>14</sup> *Id.*, at ¶ 209.

<sup>15</sup> *Id.*

<sup>16</sup> Second Order on Reconsideration, ¶ 195.

<sup>17</sup> Order at ¶ 210.

<sup>18</sup> *Id.*

constructing institutional networks, donating money to local educational or charitable institutions, or specifying the amount or type of capacity that an OVS must possess.<sup>19</sup>

**(d) May LFAs require commitments by OVS operators to build out their systems to serve subscribers in particular portions of the franchise area?**

No. Unlike cable operators, OVS operators are not required to negotiate build-out requirements, construction timetables or other universal service commitments with the municipalities whom they serve.<sup>20</sup>

**5. Gross Revenue Fees**

**(a) May the LFA require the OVS operator to pay a fee to offer local OVS services and, if so, how is this fee arrived at?**

Yes. As compensation for the use of public rights-of-way, and in lieu of a franchise fee, the LFA may negotiate a "gross revenue fee" with the OVS operator seeking to offer services in the community. This annual fee is calculated based on the percentage of revenues earned by the OVS operator and its affiliated programmers, including video programming revenues from local subscribers and advertisers. Gross revenues also include carriage fees paid to the OVS operator by unaffiliated video programmers providing programming on the system.<sup>21</sup> However, any gross revenue fees that the OVS operator or its affiliated programmers collect from subscribers are excluded from gross revenues.<sup>22</sup>

Consistent with the traditional cable franchise fee, the gross revenue fee is negotiable up to the level of 5%. If the LFA and the OVS operator are unable to agree on the level of this fee, the fee is to be set at the same percentage of gross revenues as that paid by the incumbent cable franchisee.<sup>23</sup>

**(b) May the LFA seek recovery of fees beyond those included in the gross revenue fee?**

The FCC contemplated that the gross revenue fee was "intended as compensation by the open video system operators for use of the public rights-of-way." The FCC also said, however, that local governments may impose "normal fees associated with zoning and construction of an open video system," *provided* that such fees do not "duplicate the compensation provided by the gross revenue fee."<sup>24</sup> Since such fees must be assessed in a non-discriminatory and competitively neutral manner, presumably they would arise out of regulatory obligations applicable to other users of the rights-of-way, including competitive cable operators.<sup>25</sup>

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<sup>19</sup> *Id.*, at ¶ 211.

<sup>20</sup> *Id.*, at ¶ 215.

<sup>21</sup> *Id.*, at ¶ 220.

<sup>22</sup> *Id.*

<sup>23</sup> Second Order on Reconsideration, ¶¶ 193-197; Order at ¶¶ 208-212, 218-220.

<sup>24</sup> Second Order on Reconsideration, ¶ 196.

<sup>25</sup> *Id.*

## **6. Programming and Rates**

### **(a) What are an OVS operator's obligations regarding cable "must-carry" and retransmission consent requirements?**

They are basically the same as those of the cable operator.

With respect to must-carry, broadcast stations are entitled to insist on carriage on an OVS providing service in the stations' local market area.<sup>26</sup> Furthermore, an OVS operator must ensure that every subscriber on the system receives all the must-carry channels.<sup>27</sup>

Under the retransmission consent rules, which now apply to OVS operators, the station and the video services provider negotiate the terms of a carriage arrangement and the station is permitted to receive compensation in return for carriage.<sup>28</sup>

### **(b) How are OVS operators required to allow independent programmers access to their systems?**

The FCC has issued extensive rules to answer this question, which the Commission will provide to municipalities on request. The basic requirements are outlined below.

After the close of the OVS operator's initial programming open enrollment period<sup>29</sup> and following carriage negotiations with interested programmers, the OVS operator must allocate channel capacity to each of the system's programmers on a non-discriminatory basis.<sup>30</sup>

If programming demand exceeds the current capacity of the OVS, at least two-thirds of the system's "activated channel capacity" must be made available to *unaffiliated* video programmers.<sup>31</sup> Program providers who are affiliated with the OVS operator may use only the remaining one-third capacity. Channels devoted to PEG programming and must-carry stations, however, do not count against this one-third cap.<sup>32</sup>

Following this initial allocation process, the OVS operator will be required to allocate open channel capacity, if available, on a non-discriminatory basis at least once every three years.<sup>33</sup>

### **(c) Are OVS rates publicly regulated and, if so, which tiers of service are regulated and by whom?**

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<sup>26</sup> Order at ¶ 160.

<sup>27</sup> *Id.*, at ¶ 162.

<sup>28</sup> *Id.*, at ¶ 167.

<sup>29</sup> RCN/BETG's enrollment period ends May 28, 1997.

<sup>30</sup> Order at ¶ 70.

<sup>31</sup> *Id.*, at ¶ 72.

<sup>32</sup> *Id.*, at ¶ 64.

<sup>33</sup> Order at ¶ 92.

Under federal law, OVS operators are not subject to any federal, state or local rate regulation.<sup>34</sup> Likewise, OVS operators are not required to offer a basic service tier of programming.<sup>35</sup> Providers are free to set up their programming in whatever way they see fit, provided that unaffiliated programming is offered on a non-discriminatory basis.

## **7. The Dispute Resolution Process**

### **What happens if the LFA and the OVS operator are unable to agree on any of these issues?**

The FCC has established a dispute resolution process to hear disputes between OVS operators and others with whom they negotiate, including LFAs and independent programmers. An LFA may file a complaint with the FCC if there are disputes arising out of the FCC's OVS rules.<sup>36</sup> While these complaints may be considered entirely on the written submissions of the parties, the FCC may also hold a public hearing on disputed issues.

The dispute resolution procedures are quite detailed and we would therefore urge local officials to consult counsel before pursuing an FCC dispute resolution ruling.

## **Conclusion**

As the RCN/BETG's OVS plans move forward, there will undoubtedly be more questions which arise for local officials. The Commission stands ready to assist any municipality on any questions surrounding the legal rights and responsibilities of all involved parties.

Should you need general information on OVS or RCN/BETG, please call Gordon Champion, our Municipal Liaison at 617-727-6925. If you have specific legal questions on the rules discussed above, please contact Assistant General Counsel Helen Koroniades at the same number.

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<sup>34</sup> 47 U.S.C. § 573(c)(1)(C).

<sup>35</sup> Order at ¶ 163.

<sup>36</sup> 47 C.F.R. § 76.1514.